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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re the Application of)

JEFFERY SCOTT) File No. BPH-910213ME

)
For Construction Permit for)
new FM station on Channel 278)
at Bethany Beach, Delaware)

To: Chief, Mass Media Bureau

JUL 16 3 26 PM '91
**AUDIO SERVICES
DIVISION**

REPLY TO OPPOSITION TO PETITION TO DENY

EICHER COMMUNICATIONS, INC.

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Its Counsel

Dated: July 15, 1991

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6 1991

FM EXAMINERS

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EICHER COMMUNICATIONS, INC. ("Eicher"), pursuant to Sections 1.45(b) and 73.3584 of the Commission's Rules,^{1/} hereby replies to the "Opposition to Petition to Deny," filed July 2, 1991 by Jeffery Scott ("Scott").^{2/3/}

A. Summary of Argument in Reply

1. Scott claims that on May 30, 1991, the Commission changed its rules involving the processing of applications under Section 73.213(c) effective July 15, 1991, and that he has correctly relied upon Section 73.213(c) up until this time for processing of his

^{1/} 47 C.F.R. §§1.45(b) and 73.3584.

^{2/} Eicher's Reply is timely filed. See, 47 C.F.R. §§1.4(b) and 1.45(b).

^{3/} Scott's contention that Eicher's has failed to demonstrate standing to petition to deny his application, Opposition, p. 1, fn. 1, is without merit. The residence of Eicher's principal within the service area is a fact of which official notice may be taken from Eicher's application. See, Eicher Form 301 Application, Section II, Item 5. See also, Exhibit 3 to the Application, in which Eicher's principal claimed part-time local residence credit. Even assuming arguendo that official notice could not be taken of such facts, such a shortcoming can be addressed in an affidavit/declaration in support of a reply pleading. See, Waterway Communications System, Inc., 51 RR 2d 1655 (1982). Attachment 1 hereto is the Declaration of Elaine C. Eicher, in which she verifies her part-time residence within the service area of Scott's application, as amended.

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application. Scott "doesn't get it." The Commission has not "modified" its rules and policies concerning the filing of short-spaced applications. Scott's May 16, 1991 Amendment did not comply with Section 73.213(c) because even though Scott's amendment could be processed under Section 73.213(c) for the three stations that were short-spaced by the allotment of Channel 278 to Bethany Beach, Scott was still required to demonstrate that he met the minimum distance separations for all other facilities.

2. Further, as noted in the Petition, Scott cannot fall back on his original proposal. The Commission will not consider short-spaced applications when another mutually exclusive application can satisfy the Commission's mileage separation rules. The Commission should dismiss the Scott application.

B. The Bethany Beach Situation

3. The Petition for Rulemaking seeking the allotment of Channel 278A to Bethany Beach was filed prior to the adoption of the Commission's Report and Order, 4 FCC Rcd 2792, 66 RR 2d 1473 (1989), which set forth the new Class A rules (hereinafter the "1989 Report and Order"). The reference coordinates for Channel 278 established in the Bethany Beach Notice of Proposed Rulemaking, 4 FCC Rcd 8121 (M. Med. Bur. 1989), were N. Lat. 38-32-22 and W. Long. 75-03-20. Id., 4 FCC Rcd at 8122, fn. 1.

4. The Commission established October 2, 1989 as the effective date of the minimum distance separations under Section 73.207 which were adopted in the 1989 Report and Order, supra, 66 RR 2d at 1485 (¶ 57). Therein, the Commission recognized that

certain existing stations would be short-spaced and accordingly adopted Section 73.213(c) to "grandfather" those particular stations.

5. As demonstrated in the attached "Allowable Area Map" (Figure 1) and "FM Channel Study" (Table 1) prepared by Eicher's consulting engineer, which are contained in Attachment 2 hereto, the reference point of the Bethany Beach allotment was short-spaced under the revised Section 73.207 to WOCQ(FM), Berlin, Maryland, WESR, Olney, Virginia and WESM, Atlantic City, New Jersey. As depicted in Attachment 2, Figure 1, the minimum distance separations for those three stations overlap Bethany Beach, creating a "null" area in which no site could be located. Therefore, it was proper to file under Section 73.213(c)(1) with respect to these three grandfathered stations.

6. However, as can be seen in Table 1 of Attachment 2, the allotment was not short-spaced under Section 73.207 to several facilities including co-channel WGMS, Washington, D.C. The allotment has at all times met the new distance separation requirements under Section 73.207 with respect to these stations. Hence, WGMS was not "grandfathered" under Section 73.213 with respect to the Bethany Beach Channel 278 allotment.^{4/}

^{4/} The Bethany Beach allotment reference point is located 182.5 kilometers from WGMS and, therefore, clearly exceeds the minimum separation for a co-channel A to B station under Section 73.207, which is 178 kilometers. See, Petition, Attachment 1, "Declaration of John J. Mullaney," at p. 2.

C. Eicher Petition and Scott Opposition

7. Scott's original application requested a waiver for his short-spaced transmitter site. On May 16, 1991, he amended his application to reflect a new site and attached "a listing of the results of a frequency search which demonstrated that the operation of Channel 278A at the proposed site would not create any new short spacing(s)." (Scott Amendment, Exhibit V-B-1, p. 2).

8. Eicher's Petition pointed out that the Scott amendment incorrectly used the superseded mileage separations for all the stations in his frequency search, not just for those three "grandfathered" stations, WESR, WMGM and WOCQ, that were short-spaced to the Bethany Beach reference point by the allocation, as the Commission's Rules intend. In particular, although WGMS is not short-spaced to the Bethany Beach reference point under mileage separations effective since October 2, 1989, it is short-spaced to the Scott transmitter site. Because Scott incorrectly used the now superseded separations for WGMS, his FM frequency search did not indicate that it was short-spaced. Consequently, Scott's Amendment is fatally flawed.

9. Scott claimed that Eicher's argument mischaracterized the substance of applicable Commission Rules, and that the May 30th MO&O did not "restate" the Commission's position, rather, it amended Section 73.213 of the Rules. Scott states that his application is not in compliance with the "newly modified rule." (Opposition, p. 4, fn. 3).

10. But in fact, it is Scott that has mischaracterized Commission Rules. Scott fails to understand the nature of the "grandfather" provision of Section 73.213(c). The change in Section 73.213(c) had nothing to do with Scott's failure in his May 16th Amendment.

D. Applicants Must Meet Minimum Distance Separations

11. Section 73.207(a) of the Commission's Rules provides that the Commission will not accept for filing applications which fail to meet its minimum distance separations, unless such an application can conform to the requirements of either Section 73.213 or 73.215 of the Rules. 47 C.F.R. §73.207(a). The minimum distance separation for a Class A facility and a co-channel Class B facility is 178 kilometers. 47 C.F.R. §73.207(b)(1), Table A. The failure to meet the Commission's minimum distance separations, where a mutually exclusive applicant complies with the Commission's separation requirements, renders an application subject to summary dismissal. Donovan Burke, 104 FCC 2d 843, 60 RR 2d 110 (1986). See also, Eugene Walton, FCC 91R-58, released July 11, 1991, at ¶ 2.

12. Section 73.213(c) of the Rules allows that applications for new stations on channel allotments made by order granting a petition for amendment of the Table of FM Allotments filed prior to October 2, 1989 may be authorized in accordance with subsection (c)(1) of 73.213. 47 C.F.R. §73.213(c). The operative word is "may." An application can only be granted under this provision so long as each such application does not create a new short-space

situation. As Eicher has properly noted in the Petition, the Commission never intended applicants to circumvent the requirement that an applicant be able to demonstrate that it complies with the distance separation requirements for all stations affected by the application.

13. The Commission has only recently reiterated this position. In its Memorandum Opinion and Order in MM Docket No. 88-375, FCC 91-128, released May 30, 1991. At footnote 7 of the MO&O, the Commission stated the following:

"7/ In a connected matter, we wish to clarify our policy regarding applications for construction permits filed to implement allotments resulting from petitions for rulemaking to amend the Table of FM Allotments filed prior to October 2, 1989 (the effective date of the new Class A spacing requirements). Such applications must meet the new spacing requirements with respect to all facilities and allotments except those to which the allotment reference coordinates were short-spaced on the effective date of the allotment. In addition, such applications must meet the new spacing requirements with respect to all pending applications that are fully spaced to the reference point for the new allotment."

(Emphasis supplied).

14. That this is not a new position is underscored by the 1989 Report and Order, supra, which provided that under Section 73.213(c)(1), existing stations at locations that did not meet the new rules were "grandfathered" so that modifications and relocations could be effectuated provided that then-existing distance separation requirements were met. 66 RR 2d at 1484 (¶ 51). Thus, it is evident that the "grandfather" status attaches to the existing stations affected by the rule changes (and new allotments), not the applicant, as Scott would apparently have it.

In the Bethany Beach case, this means that certain existing stations have been "grandfathered" with respect to the assignment of Channel 278A to Bethany Beach because those existing stations are otherwise short-spaced under Section 73.207 to the Bethany Beach allotment reference point. Thus, insofar as Scott is short-spaced under Section 73.207 to WGMS, his application is unacceptable for filing and should be summarily dismissed.

15. Scott is correct that the Commission has amended Section 73.213(c) of the Rules. In the May 30th Memorandum Opinion and Order, supra, the Commission did amend Section 73.213, but not for the purpose claimed by Scott. The Commission did so "to clarify the status of Class A stations short-spaced after November 16, 1984" and to "allow up to 6 kW ERP for the remaining Class A stations that were short-spaced" prior to the adoption of the 1989 Report and Order. Id., at ¶ 38. This is clearly not the purpose cited by Scott for the amendment of Section 73.213(c). Scott cannot claim that the Commission has changed its rules on him. Scott's Amendment renders his application unacceptable for filing.

**E. Scott Has Failed to Address
the Defect in his Original Application**

16. Scott's May 16th Amendment is a "suicide amendment," which requires evaluation of Scott's original application.^{5/} However, Scott has ignored the acceptability defects of his

^{5/} Eicher will oppose Scott's July 2, 1991 "Petition for Leave to Amend" in a timely manner. In brief, Scott's fails to demonstrate good cause for acceptance of this 11th hour engineering amendment.

original application, other than to note in passing that the Commission had already accepted the application for tender and filing. (Scott Opposition, pp. 7-8, fn. 5). Of course, Section 73.3564(b) of the Rules states in pertinent part that "acceptance will not preclude the subsequent dismissal of [an] application if it is found to be patently not in accordance with the FCC's Rules." 47 C.F.R. §73.3564(b).

17. Although Scott requested a waiver of Section 73.207's minimum distance separations with respect to the 0.79 kilometer short-space to WOCQ, Berlin, Maryland. (Scott Application, Exhibit V-B-1, p. 1). Scott merely requested a waiver, without meeting the burden of a public interest showing required by the Commission with such waivers. Kenter Broadcasting Co., 62 RR 2d 1573 (1987), aff'd by Judgment, Kenter v. F.C.C., 816 F.2d 8 (D.C. Cir. 1987). On this basis alone, the Commission should have dismissed Scott's application. When coupled with the availability of a site to Eicher at which it met the minimum distance separations, the only course for the Commission is dismissal of the Scott application. Donovan Burke, supra.

F. Conclusion

18. The Commission now deals with minimum distance separations on a "go/no go" basis. 1989 Report and Order, supra. In a mutually exclusive situation, where a competing applicant like Eicher has proposed a site that meets the Commission's minimum distance separations, the Commission will dismiss the short-spaced application. Donovan Burke, supra, citing North Texas Media, Inc.

v. F.C.C., 778 F.2d 28 (D.C. Cir. 1985). Both Scott's May 16th Amendment and the original application are unacceptable for filing. The Commission should summarily dismiss his application.

WHEREFORE, in light of the foregoing, as well as the matters set forth in Eicher's "Petition to Dismiss or Deny," Eicher respectfully requests that the Commission dismiss the application of Jeffery Scott.

Respectfully submitted,

EICHER COMMUNICATIONS, INC.

By: 

Stephen Diaz Gavin
BESOZZI & GAVIN
1901 L Street, N.W.
Suite 200
Washington, D.C. 20036
(202) 293-7405

Its Counsel

Dated: July 15, 1991
0745/petdeny.opp

ATTACHMENT 1

Declaration of Elaine C. Eicher

DECLARATION OF ELAINE C. EICHER

I, Elaine C. Eicher, do hereby declare under the penalty of perjury that the following statements are true and correct to the best of my knowledge:

1. I am the President and 100% shareholder of Eicher Communications, Inc. ("Eicher"), an applicant for a new FM station at Bethany Beach, Delaware.

2. I have personally reviewed both the application of Jeffery Scott for the same Bethany Beach facilities, as well as his Amendment filed May 16, 1991.

3. I currently own a residence on 18 Terrace Road, Rehoboth Beach, Delaware 19971. See, Eicher Application, Form 301, Section I; Section II, Item 5. I have owned that residence since 1972. I reside there on a part-time basis. My automobile is currently registered at that address.

4. From my review of the Scott May 16th Amendment and specifically Exhibit V-B-4 of the Amendment, I have concluded that I reside within the 1 mV/m contour of Scott's application, as amended.

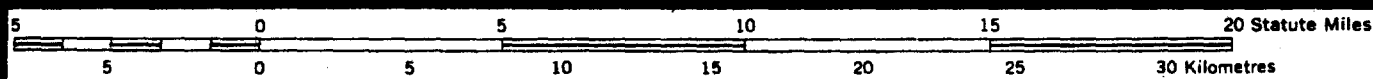
Dated: July 15, 1991

Elaine C. Eicher
Elaine C. Eicher

0745/affidav.dec

ATTACHMENT 2

"Allowable Area Map" (Figure 1) and "FM Channel Study" (Table 1)

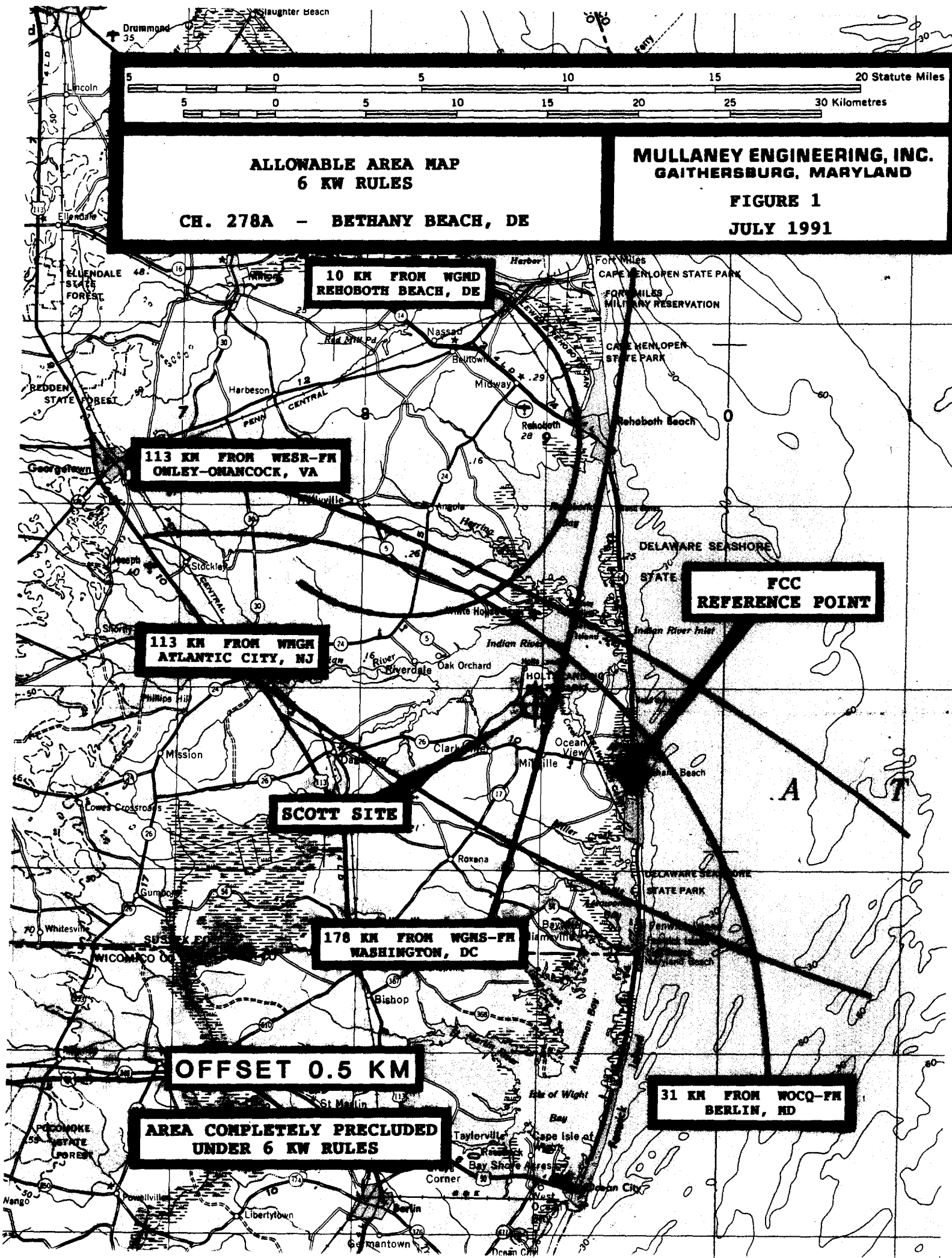


**ALLOWABLE AREA MAP
6 KW RULES**

CH. 278A - BETHANY BEACH, DE

**MULLANEY ENGINEERING, INC.
GAITHERSBURG, MARYLAND**

**FIGURE 1
JULY 1991**



***** FM CHANNEL STUDY NO. 1 - MULLANEY ENGINEERING, INC. GAITHERSBURG, MARYLAND - 12-JUN-91 12:54:17 *****
 ***** LAST UPDATE: 910710 *****

FCC REF. 278 A FA POLARIZATION ERP (KW) HAAT RCANSL
 Bethany Beach DE US HOR PLN BM TILT (METER) (METER)
 38.3222 75.0320 (D.MHSS) HORIZONTAL 6.000 0.000 100.0
 VERTICAL 0.000 0.000 0.0

AZIMUTH		CALL	STS	FILE NUMBER	CITY	ST C	LAT (D.MHSS)	LONG REL CHN	ERP (KW)		HAAT D (M) A	3 KW RSEP (KM)	DIST (KM)	6 KW RSEP (KM)	STATUS
FROM	TO								HORZ	VERT					
325.3	145.2	WGMD	LIC	BLH6807	Rehoboth	DE A	38.4205	75.1158 IF 224A	3.00H	3.00V	91		21.9	10.	
211.2	30.8	WESRFM	LIC	BLH624	Onley-Ona	VA A	37.4302	75.4101 1ST 277B	50.H	50.V	98	105	106.6	113.	S-GF
304.9	124.9	NEW	APP	BPH910213ME	Bethany B	DE A	38.3421	75.0658 CO 278A	3.0H	3.0V	1000		6.4	115.	.
COMMENTAmended 910516															
304.9	124.9	NEW	APP	BPH910213MF	Bethany B	DE A	38.3421	75.0658 CO 278A	3.H	3.V	1000		6.4	115.	.
**CUT-OFF DATE = 06/17/91															
0.0	0.0	VAC			Bethany B	DE A	38.3222	75.0320 CO 278A	H	V			0.0	115.	-
COMMENTEffective 1-11-91 **DOCKET**89-498 **															
284.6	103.4	WGSFM	CP	BPH900205IG	Washingto	DC A	38.5609	77.0533 CO 278B	44.H	44.V	158D	163	182.5	178.	Close
284.6	103.4	WGSFM	LIC	BLH880104KE	Washingto	DC A	38.5609	77.0533 CO 278B	46.H	46.V	155D	163	182.5	178.	Close
26.3	206.6	WGM	LIC	BLH850322KK	Atlantic	NJ A	39.2338	74.3034 1ST 279B	50.H	50.V	106D	105	106.0	113.	S-GF
321.5	140.8	WXY	LIC	BLH900110KD	Havre De	ND A	39.3355	76.0708 1ST 279B	50.H	42.V	104D		146.4	113.	
232.6	52.4	WOCQ	LIC	BLH850423KS	Berlin	MD A	38.2258	75.1858 2ND 280A	3.00H	3.00V	100	27	28.6	31.	S-GF
232.6	52.4	WOCQ	APP	BPH900111IB	Berlin	MD A	38.2258	75.1858 2ND 280A	6.H	6.V	100	27	28.6	31.	S-GF

NOTE: THIS PENDING APPLICATION FOR 6 KW IS DEFECTIVE.

S-GF - SHORT SPACED BUT QUALIFIES FOR GRANDFATHERED STATUS UNDER 73.213(C)

MULLANEY ENGINEERING, INC.
GAITHERSBURG, MARYLAND

TABLE 1

FM CHANNEL STUDY
6 KW RULES

CH. 278A - BETHANY BEACH, DE

MULLANEY ENGINEERING, INC.

8046 SHADY GROVE COURT
GAITHERSBURG, MD 20877

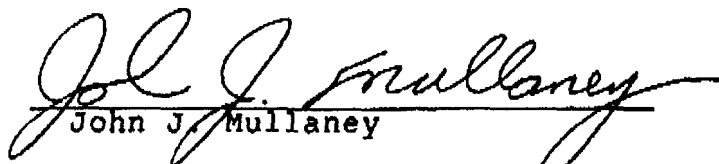
301 921-0115

DECLARATION

I, John J. Mullaney, declare and state that I am a graduate electrical engineer with a B.E.E. and my qualifications are known to the Federal Communications Commission, and that I am an engineer in the firm of Mullaney Engineering, Inc., and that firm has been retained by Eicher Communications, Inc., to support a reply to the opposition to petition to dismiss the Application of Jeffery Scott BPH-910213ME for FM Channel 278A at Bethany Beach, Delaware.

I prepared the foregoing "FM Channel Study", which is Table 1 and the "Allowable Area Map", which is Figure 1, for Eicher's "Reply to Opposition to Petition to Deny".

All facts contained herein are true of my own knowledge except where stated to be on information or belief, and as to those facts, I believe them to be true. I declare under penalty of perjury that the foregoing is true and correct.


John J. Mullaney

Executed on the 15th day of July 1991.

Attachments - Table 1 & Figure 1

CERTIFICATE OF SERVICE

I, Leigh Ann Shamp, a secretary in the law firm of Besozzi & Gavin, do hereby certify that I have, on this 15th day of July, 1991, sent the foregoing "REPLY TO OPPOSITION TO PETITION TO DENY" by U.S. mail, first class, postage-prepaid, to the following:

Dennis P. Corbett, Esquire
Leventhal Senter & Lerman
2000 K Street, N.W. Suite 600
Washington, D.C. 20006
Counsel to Jeffery Scott



Leigh Ann Shamp